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In the Supreme Court of the United States

OCTOBER TERM, 1994

SANTA FE PACIFIC CORPORATION, PETITIONER,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

DAVID C. GUSTMAN
HARRY L. DELUNG, JR.
WESTON W. MARSH
Freeborn & Peters
311 South Wacker Drive
Chicago, Illinois 60606
(312) 360-6000

JAMES D. HOLZHAUER
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
ANGELA K. DORN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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The Seventh Circuit held that a company that decided to sell a subsidiary for reasons unrelated to withdrawal liability, but that deliberately structured the sale-of-business transaction to come within the statutory safe harbor of ERISA § 1398, ran afoul of § 1392(c) and was subject to withdrawal liability. As we demonstrate in our petition, that holding nullifies the statutory safe harbor, is contrary to formal opinions issued by the Pension Benefit Guaranty Corporation, and conflicts with decisions of three other circuits.

Central States' Brief in Opposition makes absolutely no effort to defend the Seventh Circuit's actual (and quite clear) holding. Instead, it deliberately distorts the question presented by the petition, claiming (incorrectly) that Santa Fe construes § 1398 as an "absolute" safe harbor that would

deprive § 1392(c) of any application to stock sales. Only by grossly mischaracterizing Santa Fe's argument can Central States even attempt to argue that the question presented does not warrant review.

In addition, to make the Seventh Circuit's decision appear consistent with PBGC Opinions and with the holdings of other circuits, Central States rehashes factual arguments that were *rejected* below and that played absolutely no part in the court of appeals' decision. The court of appeals deemed "irrelevant" (Pet. App. 7a) all of Central States' arguments about the prospects of SFTT under the new ownership. Central States' assertions that SFTT was a "failing" company, that assessment of withdrawal liability was "imminent" at the time of the sale, and that the purchaser was "assetless" and so weak that SFTT could not possibly survive are unsupported by the factual findings below and made no difference to the court of appeals.

This Court should pay no attention to Central States' attempt to obscure the issues, and should grant certiorari to review a decision that would seriously disrupt the settled expectations of parties to countless past and future sale-of-business transactions.

1. The central premise of Central States' Brief in Opposition—that Santa Fe proposes a rule that would make the "evade or avoid" provision of § 1392(c) inapplicable to § 1398 sale-of-stock transactions (Br. in Opp. 4-8)—is completely false. We *agree* that if a principal purpose of a sale-of-business transaction is to evade or avoid withdrawal liability, § 1392(c) applies, and the fact that the sale may have been structured in accordance with § 1398 or § 1384 does not exempt the seller from withdrawal liability. But the Seventh Circuit held something very different. It held that even though avoidance of withdrawal liability was *not* a principal purpose of the transaction (*i.e.*, the decision to sell the subsidiary), because the prospect of withdrawal liability was

a principal factor in the decision to *structure* the transaction as a sale of stock, the transaction ran afoul of § 1392(c).

It is nonsensical to hold that whenever a seller intentionally structures a legitimate sale-of-business transaction to take advantage of one of the statutory safe harbors it violates § 1392(c). Yet that is exactly what the Seventh Circuit held in this case. The court of appeals acknowledged that "[t]here is no doubt that for reasons unrelated to withdrawal liability Santa Fe wanted to get rid of the subsidiary." Pet App. 4a. But, in the court's view, that was not the issue:

> The issue is not whether Santa Fe had compelling reasons independent of withdrawal liability to divest itself of SFTT; that is a given. The issue is the *form* the divestiture took—a sale of stock rather than of assets.

Id. at 7a.

As we demonstrate in our petition, the statutory safe harbors of § 1384 and § 1398 are critical to the balance Congress sought to achieve when it enacted MPPAA. The Seventh Circuit's interpretation of § 1392(c) would effectively nullify § 1384 and § 1398 by imposing withdrawal liability whenever an employer intentionally structures a sale-of-business transaction to come within one of the safe harbors. Notwithstanding Central States' mischaracterization of the petition (Br. in Opp. 4-8), we never contended that § 1392(c) has no application to safe harbor transactions. If "a principal purpose" of a sale of business is to evade or avoid withdrawal liability, the transaction can be disregarded under § 1392(c) even if it is structured in accordance with one of the safe harbors. On the other hand, if evasion or avoidance of withdrawal liability is *not* a principal purpose of the sale of business, the fact that the transaction is deliberately structured to come within one of the safe harbors in order to prevent withdrawal liability does not run afoul of § 1392(c).

We do not claim that "§ 1398 is an absolute safe harbor" (Br. in Opp. 5) or that the "sale of a contributing subsidiary bars plans absolutely from seeking liability from the former parent if the former subsidiary withdraws." *Id.* at 6. Those are gross distortions of the petition. What we do contend is that § 1392(c) does not nullify the safe harbors, and that the deliberate structuring of a transaction to come within § 1384 or § 1398 does not by itself violate § 1392(c). Central States fails to address that critical point, which is the real point of the petition.

The legislative history and caselaw Central States relies upon (Br. in Opp. 6-7) recognize that § 1392(c) and the two safe harbors work together to ensure that legitimate corporate transactions are permitted, but "sham transactions" that are not "bona fide and arms' length" are not given effect. That is fully consistent with the previously-settled understanding of the statute that was thrown into doubt by the Seventh Circuit's decision.

2. Central States' meager attempt to reconcile the Seventh Circuit's holding with PBGC Opinion Letter 85-15 (Br. 8) also depends entirely on its mischaracterization of Santa Fe's position. Of course the PBGC Opinion did not state that § 1384 provides an "absolute exemption[ ] from withdrawal liability." *Ibid.* We never contended that it did. What the PBGC did advise is that the sale of a subsidiary would not violate § 1392(c) even though the "sole purpose" for structuring the transaction as a stock sale was to avoid withdrawal liability.

The Seventh Circuit concluded just the opposite: that the deliberate structuring of a sale-of-business transaction as a stock sale in order to avoid withdrawal liability by itself is contrary to § 1392(c). It is not possible to reconcile the PBGC Opinion Letter with the Seventh Circuit's decision. Parties to sale-of-business transactions need the Court's

guidance to resolve these contrary interpretations of important ERISA provisions.

3. Central States completely fails to come to grips with the court of appeals' broad and insupportable holding. Instead, it tries to avoid certiorari by rehashing factual arguments that were *rejected* by the arbitrator and the courts below. Central States repeatedly characterizes SFTT as a "failing" business (Br. in Opp. i, 4, 6, 12, 13); it asserts that Santa Fe sold SFTT at a point when it knew that the imposition of withdrawal liability was "imminent" and "certain" (*id.* at i, 2, 4, 13, 14); and it claims that Santa Fe, acting out of "desperation," sold the business to "an almost assetless purchaser" that was destined to fail. *Id.* at 2, 6, 13.

The simple answer to all of these factual arguments is that the Seventh Circuit did not rely on *any* of those "facts." To the contrary, it deemed them "irrelevant" to the issue of whether Santa Fe structured the transaction as a stock sale in order to preclude the imposition of withdrawal liability. Pet. App. 7a. Besides, these factual arguments were all *rejected* by the arbitrator and the district court and were not accepted by the court of appeals:

a. *SFTT was not a "failing" business.* In selling SFTT, Santa Fe did not "dump" a "failing subsidiary." The arbitrator found that "Santa Fe felt that SFTT was a viable business and could very well do better if it were not part of Santa Fe" (Pet. App. 120a) and that "SFTT was a sound company." *Id.* at 21a. That finding was bolstered by the fact that there were competing bids for the subsidiary, including a bid from senior SFTT executives in the best position to know about the company's viability. These bidders were willing to pay millions of dollars to buy the company. *Id.* at 20a-21a; 121a-122a. The court of appeals did not overturn any of those factual findings.

b. *Imposition of withdrawal liability was not "imminent."* The imposition of withdrawal liability was not "imminent" at

the time of the sale. To the contrary, "[t]he evidence in this case makes it quite clear that Santa Fe did not believe that withdrawal liability would arise after the sale." Pet. App. 21a. The district court also flatly rejected Central States' bogus argument (Br. in Opp. 13 & n.9) that withdrawal liability was imminent because of a supposed 70% decline in contribution levels. Pet. App. 47a-51a, 61a-62a. The court of appeals did not question these findings, but instead agreed that SFTT had "avoid[ed] the risk of withdrawal liability" by rehiring discharged employees. *Id.* at 4a.

c. *RSI was not a weak purchaser.* At the time of the sale, RSI, the company that purchased SFTT, was not an "assetless purchaser" destined to fail. As the arbitrator held, "the management of RSI had many years of successful experience before the purchase." Pet. App. 22a. The viability of the purchaser (and of SFTT under the purchaser) was also demonstrated by the fact that RSI was able to obtain commercial financing for the acquisition. *Id.* at 21a. Events subsequent to the sale, including a crippling strike by the Teamsters Union and the inadvisable purchase of Burlington Northern's trucking subsidiaries, caused RSI and SFTT to fail, not any inherent weakness at the outset. *Id.* at 21a-22a, 124a.

The district court held that the arbitrator's findings on *each* of these factual issues were supported by the evidence and were not clearly erroneous (Pet. App. 12a-14a), and the court of appeals did not question those findings. More importantly, Central States' implication that its assessment of withdrawal liability was warranted in light of these "facts" flies in the face of the Seventh Circuit's characterization of such factors as "irrelevant." *Id.* at 7a. The court of appeals held that Santa Fe's decision to structure the transaction as a sale of stock to avoid withdrawal liability, by itself, was sufficient to call § 1392(c) into play. It is that erroneous and detrimental holding that warrants review by this Court.

4. Central States repeats its mischaracterization of the question presented by the petition in its attempt to reconcile the conflict among the circuits. We *agree* that none of the other circuits have held that § 1392(c) has no application to § 1398 sale-of-stock transactions, but that is not our contention. As we point out in the petition (16-20), the Third, Sixth and Ninth Circuits have all construed § 1392(c) in a way that would not countenance the result reached by the Seventh Circuit in this case.

In *Dorn's Transp., Inc.* v. *Teamsters Pension Trust Fund*, 787 F.2d 897, 902 (3d Cir. 1986), the court of appeals held that a sale-of-business transaction structured as a § 1398 sale of stock and entered into by the seller to avoid withdrawal liability, did not violate § 1392(c) absent a showing of bad faith. That holding cannot be reconciled with the Seventh Circuit's conclusion that a decision to structure a transaction as a sale of stock in order to prevent withdrawal liability by itself violated § 1392(c). If the Seventh Circuit's rule had been in effect, the Third Circuit would not have needed to examine whether the transaction was entered into in bad faith. The fact that it had been entered into to avoid withdrawal liability—which the Third Circuit was willing to assume—would have been enough to violate § 1392(c).

Similarly, the ruling in *Teamsters Pension Trust Fund* v. *Central Mich. Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987), aff'd, 857 F.2d 1107 (6th Cir. 1988), made it clear that more than a decision to structure a transaction as a § 1398 sale of stock was needed to raise an issue under § 1392(c). "[I]f a transaction or change in corporate structure was not a sham * * * then withdrawal liability cannot be assessed against the predecessor corporation upon failure or withdrawal of the successor." 698 F. Supp. at 703. The Sixth Circuit's requirement of a "sham" transaction is totally inconsistent with the Seventh Circuit's holding in this case.

Cuyamaca Meats, Inc. v. *Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987), cert. denied, 485 U.S. 1008 (1988), squarely held that a "bona fide, arms-length" action, taken with the intent to reduce withdrawal liability, would not violate § 1392(c). That holding, once again, cannot be reconciled with that of the Seventh Circuit, which held that an employer violates § 1392(c) whenever it structures a legitimate transaction to prevent withdrawal liability.

5. As we demonstrate in our petition (20-24), and as the *amici* representing the trucking, railroad and warehouse industries emphasize in their briefs, the Seventh Circuit's decision threatens to disrupt the settled understanding of how MPPAA applies to countless past and future sale-of-business transactions. In light of the unambiguous statutory language, the PBGC Opinion Letter and the advice of numerous secondary sources relying on those authorities, parties selling or buying businesses have deliberately structured their transactions as § 1398 stock sales in order to prevent withdrawal liability. The Seventh Circuit's decision calls this widespread practice into question, and parties to these transactions need to have the uncertainty put to rest.

Central States' assertion (Br. in Opp. 12-15) that the issue presented by this case has not come up frequently in the past ignores the fact that prior to the Seventh Circuit's decision, businesses and their counsel believed that the law was settled and that the deliberate structuring of a transaction to fit within one of the statutory safe harbors would not, by itself, violate § 1392(c). Now that the law in this area has been confused by the Seventh Circuit's decision, the issue will be aggressively pursued by pension fund trustees seeking multi-million dollar recoveries, and will needlessly disrupt past and future transactions.

Central States' emphasis, once again, on the "unique set of facts" of the Santa Fe transaction—"facts" that were *rejected* by the arbitrator and the courts below—does not alter

the court of appeals' broad legal holding or diminish its importance.* The Seventh Circuit's legal holding was not that withdrawal liability was warranted by the particular facts of the SFTT transaction. Rather, the court of appeals held that § 1392(c) comes into play whenever a company deliberately structures a legitimate sale-of-business transaction to fall within the protection of § 1398.

This Court should review the Seventh Circuit's expansive legal ruling, a ruling that directly contradicts the formal opinion issued by the PBGC shortly after the enactment of MPPAA, and that cannot be reconciled with decisions of three other circuits. The court of appeals' decision casts serious doubt on the legal rules applicable to past and future sale-of-business transactions. That doubt should not be permitted to linger.

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* For example, Central States asserts that "[i]t is the imminence of the withdrawal, coupled with the decision to divest, that makes 'a' principal purpose of the sale to evade or avoid withdrawal liability." Br. in Opp. 14. But the Seventh Circuit did not rely on "the imminence of withdrawal" in reaching its decision, and did not overturn the arbitrator's finding that withdrawal was not imminent. Pet. App. 21a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID C. GUSTMAN
HARRY L. DELUNG, JR.
WESTON W. MARSH
Freeborn & Peters
311 South Wacker Drive
Chicago, Illinois 60606
(312) 360-6000

JAMES D. HOLZHAUER
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
ANGELA K. DORN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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